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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY, APPELLANTS

V.

THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF AMICUS CURIAE CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION IN SUPPORT OF PARTIAL REVERSAL

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QUESTION PRESENTED

In this amicus curiae brief, the California Energy Resources Conservation and Development Commission will address only part of the question appellants present in this proceeding. For purposes of this brief, the question presented is whether the portions of section 210(e) of the Public Utility Regulatory Policies Act of 1978, which authorize exemptions from the Federal Power Act and Public Utility Holding Company Act are within Congress' power and will remain in effect should this court hold that other portions of section 210 are unconstitutional.

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INTEREST OF AMICUS CURIAE

The California Energy Resources Conservation and Development Commission (hereinafter "the Commission") is responsible for developing California's energy policy, evaluating the need for additional sources of energy, and permitting construction of new major electric generating stations.[1] The Commission's enabling legislation requires it, every two years, to publish a comprehensive report on the state's future energy needs.[2] That report includes a determination of future demand levels for electrical energy together with recommendations on the types of electrical

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[1]Cal. Pub. Res. Code §§ 25000 et seq. (West Supp. 1981).

[2]Cal. Pub. Res. Code §§ 25300 et seq. (West Supp. 1981).

energy sources which can and should be used to meet those demand levels, taking into consideration potential social, economic, and environmental impacts.

In its 1981 Biennial Report, the Commission set priorities for which generation resources should be pursued first to meet the state's projected electrical demand.[3] This listing ranks geothermal and renewables (powered by solar, biomass, municipal and forest waste, wind, water, or other renewable resources) highest among the preferred electricity generation options, followed by alternatives, such as cogeneration, which make better use of conventional

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[3]See Energy Tommorrow; Challenges and Opportunities for California Biennial Report, page 98 (1981); and Electricity Tomorrow, 1981 Final Report; California Energy Commission, page 300.

energy resources. Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) which the lower court held unconstitutional, was specifically drafted to accelerate development of these resources.[4]

In the 1981 Biennial Report, the Commission determined that PURPA would have beneficial impacts on the supply of electrical energy in California and that more cogeneration and small power production facilities (qualifying facilities) would be developed if section 210

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[4]S. Conf. Rep. 95-1292, 95th Cong., 2d Sess. 1978. (P.L. 95-617, 92 Stat. 3117-3173, 16 U.S.C.A. § 824 a-3 (West Supp. 1981).) Except where otherwise indicated, the terms cogeneration and small power production facility will be referred to as "qualifying facilities" which are those resources to be encouraged under section 210 of PURPA. 16 U.S.C.A. § 824(a)-3 (West Supp. 1981). They are defined at 16 U.S.C.A. § 796 (17-18) (West Supp. 1981).

of PURPA were applicable to such facilities.[5] One of the principal reasons for this conclusion is the portion of section 210(e) which authorizes the Federal Energy Regulatory Commission (FERC) to exempt qualifying facilities from the provisions of the Federal Power Act of 1920 (FPA)[6] and Public

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[5]See, for example, Electricity Tomorrow, 1981 Final Report California Energy Commission, pp. 235, 240.

[6]Under the FPA (16 U.S.C.A. §§ 796 et seq. (West Supp. 1981)), the Federal Power Commission (now FERC) regulates rates, prohibits the sale of utility facilities without federal permission, controls the issuance of securities by utilities and requires specific record keeping procedures and public disclosures. 16 U.S.C.A. 824(b), (c),(g), 16 U.S.C.A. 825 (West Supp. 1981). These regulatory requirements, and many others as well, are imposed on all public utilities who sell power in interstate commerce. Congress imposed such requirements after this court determined that states could not regulate interstate sales of electricity. See Public Utilities Commission of Rhode Island v.

Utility Holding Company Act of 1935 (PUHCA).[7]

Attleboro Steam and Electric Company, 273 U.S. 83, 89-90, 47 S.Ct. 294, 296 (1927). As utilities have increasingly integrated their transmission systems, the requirements have been imposed on nearly all generators of electricity on the theory that when power is sold to a utility who has interstate transactions, that power is likely to find its way into interstate commerce. See, FPC v. Florida Power and Light, 404 U.S. 453 (1972), FPC v. Southern California Edison Co., 376 U.S. 205 (1964). But for the exemption provided for in section 210(e) of PURPA, most, if not all, qualifying facilities, by selling their power to major utilities, would be subject to the FPA.

[7]Under the PUHCA, (15 U.S.C.A. §§ 79 et seq. (West Supp. 1981)) a holding company is an entity which owns more than 10 percent of the outstanding voting securities of a public utility company or any person which can control the policies of a public utility. 15 U.S.C.A. § 79(b)(a)(7) (West Supp. 1981). "Public utility" includes any privately owned electric or gas utility. 15 U.S.C.A. § 79(b)(a)(5) (West Supp. 1981). An electric utility is an entity which generates, transmits, or distributes electrical energy. 15 U.S.C.A. 79(b)(a)(3) (West Supp. 1981). Since owners of qualifying facilities generate electricity, and are thus utilities, this act

In submitting this amicus curiae brief, the Commission takes no position on the validity of Titles I and III of PURPA. (16 U.S.C. §§ 2611-2644; 15 U.S.C. §§ 3201-3211.) Nor do we take a position on the validity of the portions of section 210 of PURPA which require

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could subject the parent company or principal shareholders of an entity owning a qualifying facility to the requirement of registering as public utility holding company with the Securities and Exchange Commission. 15 U.S.C.A. 79(e) (West Supp. 1981). Failure to register or obtain an exemption from this requirement could subject the owning entity to criminal and civil penalties. 15 U.S.C.A. §§ 79(d), 79(r) (West Supp. 1981). In addition to registration, many business transactions between the utility and its owners would be regulated. This includes extension of credit and sale of services between the entities. 15 U.S.C.A. 79(l) and (m) (West Supp. 1981). Finally, PUHCA requires regulated holding companies to keep extraordinary accounts and records and make public disclosures in accordance with the Securities and Exchange Commission's rules and regulations. 15 U.S.C.A. 79(o) (West Supp. 1981).

state regulatory authorities to implement FERC rules regarding qualifying facilities or that preempt state laws regulating qualifying facilities. While the Commission agrees with the general policies embodied in the above described portions of PURPA, their validity is not an overriding concern because California has already adopted, by legislation and administrative action, most of the pricing and regulatory policies which PURPA authorizes for the rest of the nation.

For example, California, through its Public Utilities Commission has required the utilities under its jurisdiction to offer to purchase at avoided cost, all power produced by qualifying facilities. California took this action several months prior to the decision by FERC to

adopt similar requirements under PURPA section 210 for the country as a whole.[8] Further, the California Legislature has enacted several new state laws which, taken together, constitute a mini-PURPA law and add further incentives designed to accelerate development of qualifying facilities.[9]

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[8](See, California Public Utilities Commission Decision 91109 (December 19, 1978), 45 Fed.Reg. 12214, February 25, 1980.)

[9]See, Cal. Pub. Util. Code §§ 2801 et seq (West Supp. 1981); 1979 Cal. Legis. Serv., chapter 922, (requires state and local air pollution control authorities to adopt air quality control plans that make available to cogeneration and resource recovery facilities "offsets" necessary to mitigate air pollution emissions from such facilities); 1980 Cal. Legis. Serv., chapters 373 (mandates the state Public Utilities Commission to establish equitable rates which regulated utilities are required to pay to qualifying facilities for energy purchases); 908 (establishes a state bonding authority to finance alternate energy resources which include qualifying

Given California's strong interest in promoting accelerated development of qualifying facilities, as demonstrated by adoption of these statutes and policies, the Commission files this brief seeking partial reversal to ensure that the exemptions from FPA and PUHCA found in section 210(e) of PURPA are not lost in this litigation. Such exemptions are essential to allow California's energy policies, as described above, to have their intended effect.

SUMMARY OF ARGUMENT

The lower court's decision concluding that all portions of PURPA

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facilities); 987 and 1084 (exempts qualifying facilities from state public utilities regulation regarding rate structures); and 1328 (provides accelerated depreciation for qualifying facilities under the state's income tax laws).

section 210 violate the 10th amendment[10] is incorrect. While there are portions of PURPA section 210 which mandate state activities (PURPA section 210(c)) or may preempt state laws, (PURPA section 210(e)) there are other provisions of section 210 that have nothing to do with states or state policies. Specifically, provisions of section 210(e) which provide for exemptions from FPA and PUHCA simply constitute congressional direction of federal regulatory efforts. The lower court ignored this difference in reaching its decision.

Should this Court hold invalid those portions of section 210 mandating state

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[10]The Tenth Amendment reads: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

implementation of PURPA or preempting state laws, the Court can and should retain those portions of PURPA which exclusively affect existing federal regulatory power.

ARGUMENT

I. THE DECISION BELOW WAS INCORRECT IN ITS DETERMINATION THAT ALL PORTIONS OF PURPA SECTION 210 AFFECT PROTECTABLE PRINCIPLES OF STATE SOVEREIGNTY

The court below concluded that Title I, section 210 of Title II, and Title III "are unconstitutional and void in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Constitution of the United States especially the Tenth Amendment, the Supremacy Clause (article VI, section 2), and a republican form of government

as guaranteed by Article IV, section 4. . . ."[11]

In its focus upon the states' right to regulate electric utilities, the trial court rendered an overbroad decision which unnecessarily and illogically restricts Congress' power to modify federal regulatory requirements. In particular, the portion of section 210(e) providing exemptions for qualifying facilities from the FPA and the PUHCA could not rationally be found to violate the 10th Amendment, the Commerce Clause, or any other viable concept of state sovereignty. We have found no authority which would support such a ruling. However broad may be the protections

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[11](See Appellant's Jurisdictional Statement, Appendix B, page 8a.)

provided the states by the 10th Amendment, they would not appear to include a right to invalidation of Congressional actions to reduce the scope of federal regulation of electric utilities. In fact, in this instance, the states would likely regain authority which this court has previous conferred upon the federal government under the Federal Power Act. (See footnote 6, Supra.) Therefore, the trial court erred in its sweeping ruling invalidating all of PURPA section 210.

II. ASSUMING ARGUENDO THAT PORTIONS OF PURPA ARE UNCONSTITUTIONAL, THIS DOES NOT INVALIDATE ALL PORTIONS OF PURPA SECTION 210.

Should this Court uphold the provisions of section 210 authorizing preemption of state regulation of qualifying facilities and requiring specific state activities under guidelines from

the FERC, there will be little doubt as to the validity of the provisions of section 210(e) exempting such facilities from federal regulation under the FPA and the PUHCA. If, on the other hand, the Court rules that Congress, in section 210, could not validly limit state regulatory authority or require state entities to enforce a federal program in the manner proposed, then the provisions of section 210(e) providing for exemptions from federal laws should be permitted to stand, even if other portions are invalidated. Such an interpretation best carries out the principal purpose of Congress in enacting section 210 in the first place -- to encourage development of qualifying facilities.[12]

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[12](PURPA § 210, 16 U.S.C.A. 824(a)(3) (West Supp. 1981).)

This Court's decision in United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209 (1968) provides general guidance in determining severability of valid from invalid provisions. Quoting from Champlin Rfg. Company v. Corporation Commission of the State of Oklahoma, 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062 (1932), the Court noted:

> "The unconstitutionality of a part of an Act does not necessarily defeat * * * the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

By stating that it must be evident that Congress would not have enacted exemptions from FPA and PUHCA independently of the remaining provisions of

PURPA, the Court has essentially created a presumption in favor of severability of those portions of the statute which are constitutionally sustainable. The presumption must be overcome by a showing that Congress would not have had such intent. No such showing was ever made or even considered before the trial court which ignored the distinction between the exemptions from federal laws and other provisions of PURPA.

Moreover, retaining the power of the FERC to exempt qualifying facilities from the FPA and PUHCA would certainly be "fully operative as a law"[13] since such exemptions may be granted independently of any of the other provisions of PURPA and with equal effect.

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[13] Champlin Rfg. Co., supra at 586.

Even if this Court's presumption in favor of severability were not the rule of law to be applied here, the legislative history of PURPA fully supports a finding of Congressional intent to provide exemptions for qualifying facilities from the provisions of the FPA and PUHCA independent of the other provisions of PURPA. Each of the various provisions of section 210 is designed to remove some obstacle to the rapid development of cogeneration and small power production facilities. The overall purpose of section 210 is thus to encourage development of qualifying facilities by preventing their treatment as utilities. In the Conference Report which accompanied PURPA, the Joint Explanatory Statement of the Conference Committee Managers specifically confirms this intent:

> "[T]he establishment of utility type regulation over [qualifying facilities] . . .would act as a significant disincentive to firms interested in cogeneration and small power production."[14]

The FERC in promulgating regulations to implement section 210 explained its understanding of the Congressional intent as follows:

> "Under the Federal Power Act (FPA), sales from cogenerators and small power producers to a public utility (as defined in Part II of the FPA) would, so long as the electricity might make its way into the bulk power transmission grid, make the cogenerator or small power producer itself a public utility. In other words,

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[14] S. Conf. Rep. 95-1292 at 98. See also, Compilation of Statements of Witness before the Subcommittee on Energy and Power on Electric Utility Rate Performance and Regulatory Improvement, March/April 1976; U.S. Code, Congressional and Administrative News at 7930; S. Rep. 95-442, 95th Cong., 2d Sess. at 92.

> by virtue of its sale for resale in interstate commerce, the cogenerator or small power producer would itself become a public utility under Part II of the Power Act. Prior to the enactment of PURPA, the FERC was not authorized to abstain, in whole or in part, from exercising its jurisdiction over such cogenerator-public utilities and small power producer-public utilities. The prospect of plenary regulation unquestionably acted as a powerful disincentive to the generation and sale of surplus power by such facilities, particularly where the owner was an industrial concern unfamiliar with the arcane intricacies of utility regulation. 44 Fed. Reg. 38863 (July 3, 1979).

Thus, the explicit purpose for PURPA section 210(e) as enacted is to authorize removal of regulatory impediments, both state and federal, to development of qualifying facilities.[15] If we assume

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[15]PURPA section 210, S. Conf. Rep. 95-1292, p. 98.

for purposes of this discussion that state imposed regulatory requirements cannot be removed by Congress in the manner proposed due to constitutional limitations on federal power, the removal of the substantial federal impediments to development of qualifying facilities, in the form of FPA and PUHCA, would at least partially achieve the principal goal of Congress in enacting section 210.

Particularly in states like California, where state law has already removed the state regulatory impediments, removal of the federal requirements is essential and could substantially achieve the main objective of Congress in enacting section 210. On the other hand, if the federal impediments were not removed

by allowing severance of the exemptions from FPA and PUHCA from the rest of PURPA, Congress' intent would be entirely frustrated. Accordingly, the exemptions from federal requirements should stand regardless of the result on the federal/ state issues.

CONCLUSION

The court below erred in concluding that all portions of PURPA section 210 violate the 10th amendment and other provisions of law the court cited. This Court should, if it finds any portions of PURPA invalid, specifically detail which portions are invalid and retain the remainder. In particular the portions of section 210(e) which provide authority for exempting qualifying facilities from regulation under the Federal Power Act

and the Public Utilities Holding Company Act should be retained.

August 27, 1981 Respectfully submitted,

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